

DECISION



Memorandum PL-1
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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-208670, B-208809

DATE: April 13, 1983

MATTER OF: Harris Systems of Texas, Inc.;
Anti-Pest Co., Inc.

DIGEST:

1. GAO will not question the contracting agency's affirmative responsibility determination where the protesters' various grounds for disputing the agency's determination do not show that there was fraud or bad faith on the part of the contracting officials or that there were definitive responsibility criteria which were not applied.
2. Allegation that the awardee's bid bond was not adequate and was not provided until 10 days after bid opening is without merit where the record shows that the bid bond accompanied the awardee's bid and was for the penal sum required by the solicitation.
3. GAO will not consider protesters' speculative allegation that the awardee is affiliated with a large business; moreover, the Small Business Administration has exclusive authority for determining a firm's size status.
4. Protesters did not meet their burden of affirmatively proving their case where under the evidence presented, GAO cannot determine that the agency failed to include in all bid packages the page which informed bidders of the bid guarantee requirement. Consequently, GAO cannot object to the agency's decision to reject the protesters' bids as nonresponsive for their failure to include an adequate bid guarantee.

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5. Where the rejection of four out of five bids for failure to provide a bid guarantee resulted in an award to the fourth low bidder at a price more than \$1 million higher than the low bid, the contracting officials should have been alerted to the possibility that adequate competition and a reasonable price had not been obtained, requiring a further investigation before making the award. Under the circumstances, GAO recommends that the agency not exercise the contract's option provisions.

Harris Systems of Texas, Inc. (Harris), and Anti-Pest Co., Inc. (Anti-Pest), protest the rejection of their bids under invitation for bids (IFB) No. DAKF48-82-B-0100, issued by the Department of the Army (Army).

We deny the protests.

The IFB solicited bids for pest control services at Fort Hood, Texas. Five bids were received, but four out of the five, including the bids of Harris and Anti-Pest, were rejected as nonresponsive for failure to submit a bid guarantee as required by the IFB. Charta, Incorporated (Charta), was the only firm to submit a proper bid guarantee. Consequently, the Army awarded a 1-year contract with 2 option years to Charta as the only responsive bidder. Charta's total bid price of \$3,985,799.40 was fourth low. Anti-Pest was the low bidder at \$2,847,966.42, and Harris was the third low at \$3,377,905.59.

According to Harris and Anti-Pest, their bid packages did not contain page 101, which notified bidders of the bid guarantee requirement. Consequently, they were unaware of the requirement and made no attempt to obtain a bid bond or other type of bid guarantee. AAA Exterminating Company (AAA), the fifth low bidder, has submitted an affidavit in support of the protests, stating that its bid package also contained no notice that a bid guarantee was required. Bob's Pest Control, the second low bidder, advises that it did receive page 101, but apparently failed to furnish any bid guarantee. In the opinion of Harris, Anti-Pest and AAA, their bids should not have been rejected since it was the Army's fault that they failed to provide a proper bid guarantee.

In addition, Harris and Anti-Pest challenge the award to Charta. They argue that:

1. At the time of the award, Charta was not certified or licensed to do pest control work in Texas or in any other State;
2. Since Charta is a relatively new corporation with no prior pest control experience, the Army should have conducted a preaward survey to determine whether Charta has the financial and technical capability to perform the contract;
3. Due to Charta's recent incorporation and meager financial resources, it is questionable whether the firm's bid bond is adequate, and it also appears that Charta was given 10 days after bid opening to post bond;
4. If Charta's bond is adequate, then it is quite likely that this is due to the backing of Maintenance, Inc., a large business owned by the father of Charta's president, which, in turn, calls into question Charta's status as a small business under this small business set-aside; and
5. Since all the work under the contract is to be done by Killeen Pest Control (Killeen), as Charta's subcontractor, it appears that the contract was intended for Killeen all along and none of the other bidders were treated fairly.

In rebuttal, the Army maintains that page 101 was included in all the bid packages. (The complete bid package consisted of 102 pages.) The Army further notes that the Harris bid included page 101 when it was submitted to the agency.

As to Anti-Pest, the Army points out that, unlike the Harris situation, it cannot be determined for certain whether Anti-Pest's bid package contained page 101 since the bid submitted to the Army was missing that page. However,

the Army does not find this fact significant because Anti-Pest's bid was also missing pages 29 through 82, as well as page 100, yet it included page 102. The Army suggests that this pattern of missing pages weakens Anti-Pest's claim that page 101 was missing from its bid package due to some fault of the Army's and that it in fact raises the implication that Anti-Pest misplaced the page itself.

In addition, the Army notes that the IFB's cover sheet notified bidders that the IFB consisted of 102 pages, and elsewhere the IFB advised bidders that it was their responsibility to examine the bid package for completeness. In light of this, the Army argues that both Harris and Anti-Pest had an obligation to discover if any pages were missing from their bid packages and bring this fact to the agency's attention prior to bid opening. Since the protesters failed to do this, the Army concludes that they cannot complain now that page 101 was missing.

As to whether Charta was certified to do pest control work in Texas, the Army notes that the IFB only requires that the contractor's employees who apply or supervise the application of certain pesticides must meet either State or Department of Defense certification standards; the contractor itself does not have to be certified. According to the Army, Charta provided proof of the required certification prior to award. The Army further notes that Charta's subcontractor, Killeen, is in fact certified by the State of Texas.

Regarding Charta's bid bond, the Army states that a properly executed bid bond accompanied Charta's bid and, contrary to the protesters' belief, Charta was not given 10 days in order to post this bond. The Army notes that Charta had 10 days after receipt of notice of the award to furnish a performance bond and that this probably confused the protesters.

Addressing first the various issues regarding Charta, we find no basis to question the award on these grounds.

As to the question of whether Charta is licensed to perform pest control work in Texas, we note that such a matter involves a bidder's responsibility--that is, its ability to perform a particular contract. Pacific Consolidated Services, Inc., B-204781, March 10, 1982, 82-1 CPD 223. Here, the Army found Charta to be responsible. The general rule is that our Office will not review affirmative determina-

tions of responsibility except where there is a showing of fraud or bad faith on the part of the procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Pacific Consolidated Services, Inc., supra.

The protesters do not allege fraud or bad faith, but they do argue, in effect, that the Army failed to apply definitive responsibility criteria. The protesters apparently believe that the IFB required the successful bidder to have a State pest control license and, since Charta did not have such a license at the time of award, it should have been found nonresponsive.

Our Office has recognized a distinction between a solicitation requirement that the bidder have a particular license or permit and a general requirement that a bidder comply with any applicable licensing and permit requirements. In the former case, the requirement is one specifically established for the procurement and compliance with that requirement is a matter of bidder responsibility. In the latter case, a bidder's failure to possess a particular license or permit is not necessarily a prerequisite to award since the need for a license or permit to perform the contract is a matter between the bidder and the licensing authority. Career Consultants, Inc., B-195913, March 25, 1980, 80-1 CPD 215.

Contrary to the protesters' belief, the IFB did not require that Charta possess a State pest control license. Rather, section "C," paragraph 2.1, of the IFB provided:

"Personnel. Contractor's employees who are engaged in handling, transporting, mixing, applying and supervising pesticide application must meet the Texas State Standards that have been established in response to EPA's implementation of the 'Federal Insecticide, Fungicide, and Rodenticide Act, (Public Law 92-516)' or the certification requirements established by the Department of Defense Program for Certification of Pesticide Applicators."

As noted above, Charta provided proof of this required certification prior to award. Thus, insofar as this provision can be considered a definitive responsibility criteria, we find that it was satisfied.

Harris also notes that section "C," paragraph 14, of the IFB states that the "contractor shall, without additional expense to the Government, obtain all licenses, certificates, and permits required for the prosecution of the work and shall present same to the Contracting Officer for inspection prior to performance." In addition, Harris has provided a copy of a letter from the Structural Pest Control Board of Texas which states that a "firm should have a pest control license issued by the Structural Pest Control Board before they solicit pest control." In Harris' opinion, these show that Charta was required to have a pest control license from Texas.

We do not agree. As noted above, a general requirement such as paragraph 14 is not ordinarily a bar to an affirmative determination of responsibility. Career Consultants, Inc., supra. Moreover, the Pest Control Board letter also indicates that, even though Charta does not have a State license, this is not critical, since Killeen does have a license and Killeen is the firm that will actually be doing the work. We have recognized that, unless prohibited by the solicitation, certification and licensing requirements can be met by a subcontractor. 46 Comp. Gen. 326 (1966). No such prohibition was present here. (It should also be noted that Charta has informed us that it recently obtained a license in its own name from the State of Texas.) Based on these facts, we find that Charta's lack of a State license was no bar to an affirmative determination of responsibility.

The protesters have also criticized the Army's decision not to conduct a preaward survey on Charta. The general rule is that a preaward survey is not a legal prerequisite to an affirmative determination of responsibility and, furthermore, the contracting officer has broad discretion in determining whether to conduct a preaward survey or not. C.R. Daniels, Inc., B-207937, July 1, 1982, 82-2 CPD 13. Consequently, the Army's decision not to conduct a preaward survey on Charta is a matter within its discretion and provides our Office with no basis to question its determination that Charta is a responsible bidder.

The protesters also question the adequacy of Charta's bid bond and allege that Charta was given 10 days after bid opening to post the bond. The record, however, indicates that Charta's bid bond accompanied its bid and was 20 percent of the bid price as required by the IFB. This ground for protest is, therefore, without merit.

If Charta's bid bond is considered adequate, the protesters argue that this would have to be due to the financial backing Charta receives from Maintenance, Inc., a large business owned by the father of Charta's president. In the protesters' opinion, such an affiliation brings into question Charta's status as a small business under this small business set-aside.

The authority to determine the size status of a firm rests exclusively with the Small Business Administration. 15 U.S.C. § 637(b)(6) (1976); Alliance Properties, Inc., B-205253, November 10, 1981, 81-2 CPD 398. Thus, any protest against Charta's status as a small business is a matter for the Small Business Administration, not our Office.

Finally, Harris and Anti-Pest argue that all the bidders were not treated fairly. According to the protesters, the fact that Charta subcontracted the entire job to Killeen, allegedly a favorite of Fort Hood's contracting personnel, proves that the contract was intended for Killeen all along and that the other bidders were never fairly considered for the award.

There is no general prohibition against the use of subcontractors in the performance of Government contracts. Presentations South, Inc., B-196099, March 18, 1980, 80-1 CPD 209. Moreover, there was no specific prohibition or restriction on subcontracting in the IFB. Charta therefore was free to subcontract with Killeen, which we understand is also a small business. The protesters offer no evidence to support their allegation that the Fort Hood contracting officials were determined to have the contract performed by Killeen and awarded the contract to Charta just so Charta could subcontract the work to Killeen. Speculative statements do not satisfy the protesters' burden of affirmatively proving their case. Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121.

This brings us then to the question whether the protesters' bids were properly rejected for failure to include a bid guarantee. The general rule is that a bid guarantee requirement is a material part of an IFB and that, except as provided in applicable regulations, a procuring activity must reject as nonresponsive a bid which does not comply with the requirement. United States Contracting Corporation, B-198095, June 27, 1980, 80-1 CPD 446. As noted above, both Harris and Anti-Pest claim that their bid packages contained no reference to the need for any type of

bid guarantee. According to the Army, however, the evidence indicates that both protesters knew, or should have known, that a bid guarantee was required. In light of this, the Army concludes that this case falls squarely within the general rule.

Essentially, we are presented with a factual dispute between the Army and the protesters. The general rule is that the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Moreover, where the only available evidence is the conflicting statements of the protester and the contracting agency, we have held that the protester has failed to meet its burden of proof. Del Rio Flying Service, Inc., B-197488, August 6, 1980, 80-2 CPD 92.

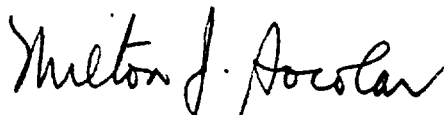
In our opinion, it is impossible to conclude on the evidence presented that the Army failed to include page 101 in all the bid packages. At best, Harris and Anti-Pest have raised some question whether the IFB contained that page. This, however, does not meet their burden of proof in this case. Consequently, we have no basis to object to the Army's decision to reject their bids as nonresponsive.

Protests denied.

On the other hand, the propriety of a particular procurement is generally determined upon the basis of whether adequate competition and reasonable price were obtained. 52 Comp. Gen. 281 (1972). It is questionable whether adequate competition or a reasonable price was obtained since four out of five bids were rejected for the same reason--the failure to furnish a bid guarantee--and Charta's bid price was more than \$1 million greater than Anti-Pest's low bid. These facts should have alerted the Fort Hood contracting personnel to the possibility that adequate competition and a reasonable price had not been obtained, thus requiring further investigation before an award was made. If this investigation had been conducted, the contracting personnel may have learned the exact reason why four out of five bidders had failed to furnish any type of bid guarantee. At that point, an informed decision could have been made whether a contract for \$1 million more than the low bid was justified or whether to obtain adequate competition and a reasonable price they needed to cancel the IFB and resolicit.

Under the circumstances, we recommend that the Army not exercise the options in the instant contract, but conduct a recompetition after the basic contract period.

By separate letter of today, we are notifying the Secretary of the Army of our recommendation.

for 
Comptroller General
of the United States